IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 398

HAZEL-ATLAS GLASS COMPANY,
Petitioner,

vs.

HARTFORD-EMPIRE COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

This case is before the Court upon a writ of certiorari to the circuit court of appeals for the third circuit, petition therefor having been granted December 13, 1943. The final judgment of that court under review here was entered June 30, 1943 (R. 242), upon an opinion filed the same day (R. 216) and reported, *Hartford-Empire Co.* v. *Hazel-Atlas Co.*, and *Hartford-Empire Co.* v. *Shawkee Mfg. Co.*, 137 F. 2d 764. The petition for certiorari was filed September 29, 1943.

The decision below was by a divided court. Circuit Judge Jones wrote the majority opinion, Circuit Judge Maris concurring. Circuit Judge Biggs filed a dissenting opinion.

The opinions below dealt with both the present case and the companion case of *Hartford-Empire Co.* v. *Shawkee Mfg. Co., et al.*, in which this Court granted a writ of certiorari on the same day as the writ in this case. In each case, a petition was filed in the circuit court of appeals for the third circuit, asking it to set aside its decision that the Hartford Company's patent was valid and infringed, because of newly discovered proof that such decision was due to fraud practiced on that court. In each case, the petition was denied, for three reasons, viz:

First, that the court did not have the power to correct its judgment, obtained by fraud, after the term, in which the judgment was entered, had expired.

Second, that although there had been fraud on the court, the judgment of the court had not been affected thereby.

Third, that the petitioner had not been diligent in presenting evidence of the fraud, and the public interest was not sufficient to warrant reconsideration of the judgment.

The *Hazel* and *Shawkee* cases here present identical questions, except as to the individual diligence in each case, which, it may be observed, is immaterial if the court below should have reviewed the judgment because of the public interest.

Jurisdiction

The final judgment, to be reviewed here, was rendered June 30, 1943, petition for certiorari was filed September 29, 1943, and was granted December 13, 1943. The juris-

diction of this Court is invoked under Section 240(a) of the Judicial Code, 28 U. S. C., Section 347, as amended.

Statement of the Case

This case and the *Shawkee* case are patent suits, brought by the respondent (hereinafter called Hartford Company or Hartford) for alleged infringement of its Peiler patent 1,655,391. Each case was filed in the district court for the western district of Pennsylvania.

In the *Hazel* case, the suit was filed in 1928 and tried in 1929 before district judge Gibson, who found that the patent was not infringed by the Hazel feeders, without deciding whether or not it was valid, *Hartford* v. *Hazel,* 39 F. 2d 111. Upon appeal, the third circuit court of appeals, by a divided court reversed, holding the patent valid and infringed, *Hartford* v. *Hazel,* 59 F. 2d 399. The majority opinion was by Circuit Judge Buffington, Circuit Judge Davis concurring. Circuit Judge Woolley dissented, with opinion.

The fraud which is the basis of the petitions by Hazel and by Shawkee consisted in a deliberate misrepresentation in Hartford's brief in the circuit court of appeals, to the effect that a very important published article had been written by one Clarke, an apparently disinterested labor union official, when in fact it had been written by a Hartford patent attorney, pursuant to a conspiracy between the Hartford Company and the Owens Bottle Company, and caused to be published to mislead the patent office into granting the Peiler patent. That the Clarke article did poison the minds of the majority is apparent from their opinion, as will be pointed out later.

At that time Hazel had some hearsay information that Hartford was responsible for the article, and after the decision came down, attempted to obtain proofs for the purpose of filing a petition for rehearing, but was prevented by Hartford and Owens getting first to Clarke. Because of this, the thorough poisoning of Judge Buffington's mind, other Hartford patent litigation against Hazel,* etc., Hazel made a settlement with Hartford, taking a license under the Peiler and other Hartford patents, until that patent expires on January 3, 1945.

The *Shawkee* suit was filed in May, 1933 with motion for preliminary injunction, which was granted by district judge McVicar, and affirmed in January, 1934 by a court composed of the same judges as decided the Hazel appeal. *Hartford* v. *Shawkee,* 68 F. 2d 726.

Shawkee had the same hearsay information about the Clarke article as did Hazel. The majority opinion of the court below states that the only difference between Hazel and Shawkee as to their respective diligence concerning the Clarke article is that——

> "Shawkee brought to the attention of the court forthwith, at the time of its pending appeal its lately acquired information concerning the Clarke article, in the manner and with the result as will now appear" (R. 221).

The majority then says that Shawkee called this matter to Judge Buffington's attention prior to the decision against it, and that upon a petition for rehearing, Shawkee again complained concerning the Clarke article, the majority say-

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*Hartford v. Nivison, et al., 6 Cir., 58 F. 2d 701, where a wholly owned Hazel subsidiary was defendant, opinion filed May 12, 1932.

ing "There can be no doubt that the matter received the attention of all of the members of the court, which had heard the Shawkee, as well as the Hazel-Atlas case" (R. 223). But the court ignored the matter. Shawkee then petitioned this Court for a writ of certiorari, which was denied, 292 U. S. 640. Shawkee then petitioned the third circuit court of appeals for leave to file a bill of review, which was denied, and this Court again denied a petition for writ of certiorari, 293 U. S. 600.

In the summer of 1941, the Government in the trial of an antitrust case in Toledo, Ohio, *U. S.* v. *Hartford, et al.*, now on appeal to this Court, produced evidence concerning the Clarke article, which had been obtained from the secret files of the Hartford and Owens companies, and which proved its fraudulent origin and nature.

The Hazel and Shawkee companies promptly moved to present this evidence to the circuit court of appeals, filing their respective petitions in October (Shawkee) and November (Hazel) 1941.

These petitions were for leave to file bills of review in the district court, to set aside the decisions of the circuit court of appeals, adverse to petitioners, because of the fraud practiced by the Clarke article. In December, 1941, the circuit court of appeals decided (*Hartford* v. *Hazel* and *Hartford* v. *Shawkee*, 125 F. 2d 976, 977):

> "In view of the fact that it is alleged that fraud was practiced upon this court rather than upon the court below, this court will adopt the practice followed by the Circuit Court of Appeals for the Second Circuit in the companion cases of *Art Metal Works, Inc.* v. *Abraham & Straus, Inc.*, 107 F. 2d 940 and 944, certiorari denied, 308 U. S. 621, 60 S. Ct. 293, 84 L. Ed. 518, and itself pass upon the

question of whether the mandates of this court should be recalled and the cases reopened. Accordingly the prayers of the petitions as framed are denied but leave is granted to the petitioners to amend the prayers and to petition this court to set aside the judgments heretofore entered in this court, on the ground of fraud. The plaintiff-appellant will then reply to the petitions for review as amended and the questions involved will be heard and determined by this court" (R. 147).

The petitions were accordingly amended and filed, the cases were reargued in February, 1942, and on June 30, 1943, the court below made the decision which is under review here.

Specification of Errors

The circuit court of appeals for the third circuit erred in holding:

1. That it did not have the power to remedy a fraud practiced upon it after the term of court, in which the decision obtained by the fraud was made, had expired.

2. That the fraudulent Clarke article upon which that court relied was not material to its decision.

3. That there was laches by petitioner in presenting to that court the evidence which established the fraud, and that such laches justified the court in refusing to set aside its former decision in favor of Hartford that the patent was valid and of broad scope.

Argument

The fundamental question here is whether the court below did right in refusing to set aside its former decisions

upholding Peiler, the Hartford patentee, as a pioneer inventor, who had contributed greatly to the practical industry. Obviously, the facts before that court should determine the answer. So we shall consider the nature of the fraud and its effect upon the court's decision, the question of petitioners' diligence, and whether the court could, and should, have set aside its decision.

POINT I

The Clarke article was fraudulent

The application for the Peiler patent sustained in the *Hazel* and *Shawkee* cases was filed in the patent office in 1919, with 118 claims, there being 69 more added before 1926. By December, 1925, the patent office had rejected all claims, either because they were disclosed in prior published patents or because other applicants for patents had won interference proceedings from Peiler, in which they were adjudged prior inventors. No claim was allowed, and Hartford cancelled all claims by amendment of January 29, 1926, presenting 103 new claims (*Hartford* v. *Hazel*, 5 App. Rec. 166).

On December 11, 1925, Brown, the patent attorney for the Hartford Company wrote to Carter of the Owens Bottle Company, which was then cooperating with Hartford in the latter's patent matters. Brown suggested that Carter "might write up an article describing the revolution produced in the glass business by the plunger gob feeding system", and

> "As you will no doubt recall, the importance of this matter lies in the fact that we must soon make a record before the Patent Office, in connection with

> the principal *Steimer* case and also *in our Peiler plunger case, where we hope to obtain claims, covering the broad ideas of keeping suspended mold charges shaped by the action of a plunger"* (R. 40).*

This "plunger case" was the application for the Peiler patent in suit. However, it was decided that Hatch, a patent attorney in the employ of Hartford (R. 31), should write the article. Hatch on April 19, 1925 wrote to Carter that he was trying to make his article look as though it really was written by a trade union official, upon the basis of the proceedings of The Bottle Blowers Association, and so

> "knowingly and intentionally I reproduced some of the errors found therein" (R. 40).

The Carter May 25, 1926 letter said (R. 41, 42):

> "It occurs to me that I should make myself more clear about the purpose of this Hatch article.
>
> "He has prepared it with the idea of getting it printed under the name of *some apparently unprejudiced authority*, and then calling the attention of the Patent Office Examiner to the article as published, in the belief that the Examiner will thereby be influenced to a more favorable consideration of Hartford's broad claims.
>
> "Of course we are equally interested with Hartford in securing these broad claims, and therefore indirectly interested in having the article published."
>
> * * * * *
>
> "Under the circumstances, I do not see that we need be very critical in our treatment of the article. If not too rank, would say that we better let it go

*Italics ours, unless otherwise stated.

through. Of course any particular statements can be corrected or cut out."

After writing the article, Hatch first attempted to get Maloney, the president of the Glass Bottle Blowers Association to sign it. Maloney refused, because

> "he had men in his organization working both in companies licensed by the Hartford-Empire Company and in companies that were not so licensed, *he did not want to have the appearance of taking sides in any way whatever,* and hence did not feel able to sponsor the article and publish it" (Hatch aff., R. 63).

Maloney knew that to sign the article was an endorsement of the Hartford patent claims, taking sides on questions disputed between Hartford and its licensees on one side, and the non-licensees on the other. Hatch then persuaded Clarke, president of the American Flint Glass Workers Union, to permit the article to be published under his name in the National Glass Budget, where it appeared in the issue of July 17, 1926. The article is in the record (R. 167).

The Hartford patent attorneys then submitted the article to the patent office, together with affidavits and other papers, "intended to lay before the Patent Office certain material facts relating to the development of the type of glass feeders to which this application relates, as well as certain facts bearing upon the prior art references" (amendment of Oct. 12, 1926, 5 App. Rec. 261).

In a brief filed in the patent office by the Hartford attorneys for the purpose of procuring the patent, they said:

> "That the appellant's feeders have been a tremendous success and have revolutionized the art

> from the standpoint of economy is recognized by *reluctant witnesses*. We call attention to the article by William P. Clarke, President of the Flint Glass Workers' Union (a union whose members have been displaced by *the feeders in question**), and published in the National Glass Budget for July 17, 1926, which is an exhibit in this case (See Appendix, page 76). Clarke in the exhibit in question gives a graph showing the rapid acceptance of suspended-charge feeders which *he terms* 'gob feeders' and stresses the great displacement of manual workers occasioned thereby" (5 App. Rec. 477).

This graph was a chart purporting to show, by production curves, how much ware was made each year from 1905 through 1925, by the Owens suction machines and by "gob feeders" (R. 176). According to it, ware commenced to be made in 1905 by the Owens machines and the amount increased greatly each year until 1917 when the rate of increase became almost stationary, while in 1917 ware commenced to be made by gob feeders, the rate of production increasing greatly through 1925, the last year shown on the chart.

But the graph was not made by Clarke, but by Hatch, who said in his April 19, 1926 letter to Carter of the Owens Company:

> "Of course I think you understand that the whole object of the article is to make an excuse to get the production curves and a few statements in regard to gob feeding into print" (R. 41).

Likewise, it was not Clarke who used the expression "gob feeders", but the Hartford patent attorneys, who

*The Clarke article does not say that the Hartford feeders displaced anyone.

needed this expression for their patent office arguments. Hatch admitted that "the expression 'Gob Feeders' does not occur anywhere in the entire report" of the labor union (R. 41).

After this article and other papers had been filed in the patent office, and other proceedings had, the application for the patent was allowed and the patent issued on January 3, 1928.

POINT II

The Clarke article biased the court and prevented a fair hearing on the competent evidence.

The Clarke article was a clever statement of the Hartford argument that Peiler was a pioneer inventor of "gob feeders", falsity mingled with truth, and given dishonest weight by its appearance of truth and disinterestedness.

The article was presented by Hartford to the patent office, and afterward to the circuit court of appeals, as showing that Peiler and the Hartford Company had invented and given to the practical glass industry the plunger feeder of the Peiler patent in 1917, thereby breaking the Owens monopoly. In the patent office, the attempt was to get claims for using a plunger feeder to shape the flowing stream of glass. In the circuit court of appeals, the attempt was to sustain the claims against the Hazel plunger feeders.

The Hartford patent attorneys in the patent office referred to the article as showing that the Hartford feeders, had revolutionized the art (*supra*, p. 10). These feeders were, of course, plunger type feeders, which is the type described in the Peiler patent and in wide use by the

glassware industry. The gist of the article was that the feeders of the Peiler patent had broken the former monopoly of the Owens suction machine, and that there was not any important patent or work on gob feeders prior to Peiler. This was not true, as was fully established by competent evidence in the trial of the present case in the district court and found by that court, as appears from its opinion, 39 F 2d. 111.

The vital issue in the case was what Peiler and the Hartford Company had done in feeder machines. The Hartford Company has always asserted that it was responsible for the use of gob feeders, including those of the plunger type. On the other hand, the position of the Hazel Company in the present case, and in the *Nivison* case (*supra*, p. 4, footnote), where several Hartford patent claims were invalidated, although some were sustained, was that Hartford never made a real invention, copied the work of others, and obtained patents only because of clever patent soliciting.

The trial in the district court was lengthy, about a month, and thorough, as evidenced by the appeal record of eight volumes. Plaintiff called twenty witnesses, including Peiler, and defendant seventeen, including Howard, Miller and Bridges, all of whom had filed patent applications for plunger feeders before the Peiler application was filed. Hundreds of exhibits were received in evidence, and lengthy briefs were submitted.

The nature of the case and the vital points appear clearly from the opinion of the trial judge, as follows:

> "The plaintiff's patent No. 1,655,391 is one of many in the separate charge feeding field of the glass art" (39 F. 2d 112).

The patent described a plunger feeder, but the claims were for only using the plunger to shape the stream of glass before it was cut into mold charges, to fall into the molds on a forming machine where the charges are finally shaped into bottles, etc. (*id.*, pp. 112, 118). The specific feeder shown was a complicated machine, with cam-lever action, instead of a simple compressed-air operated Hazel feeder, and it was necessary for Hartford to get a broad interpretation of the patent, in order to cover the Hazel feeders. So Hartford contended

> "that to Peiler is due the credit of introducing severance of the mold charge while in suspension* and that therefore the patent in suit is entitled to such construction as will give the plaintiff the benefit of that discovery" (p. 114).

As to this contention, the trial judge, after thorough consideration and discussion of the evidence before him, decided that

> "the prior art seems to stand firmly in opposition to this claim",

referring to earlier patents (p. 114).

In addition to these earlier published patents, the trial judge pointed out that others had filed patent applications for the same thing, that these applications had been put in interference in the patent office with the Peiler application to determine who was prior, and that Peiler had admitted the others were prior, abandoning all his claims therefor (*id.*, pp. 117, 118).

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*This is the same as "gob feeding", according to the Hartford patent attorneys (*supra*, p. 10).

As for the use of a plunger feeder to shape the glass stream, which was the specific feature of the Peiler patent, the trial judge found that Peiler

> "had been anticipated by several patents upon reciprocating plunger and shear feeders, and was not entitled to priority of invention upon mere feed of mold charges by means of a reciprocating plunger or upon severing such charges in suspension. This finding necessarily carries with it the further finding that plaintiff, by its patent, is not entitled to a monopoly upon all shaping of mold charges by a plunger and shear feeders, because such machines have the inherent function of fattening the charge to some extent upon the down stroke of the plunger and attenuating the upper part of it when the plunger is raised just before or at the time of severance" (*id.*, p. 118).

Hartford appealed to the circuit court of appeals and in its appeal brief, for the first time in the case, the Clarke article was mentioned. It was not in evidence nor had it been offered as an exhibit, being in the record merely as a part of the history of the patent application which resulted in the patent in suit (5 App. Rec. 303). There was not a word about the Clarke article in the testimony or briefs in the district court.

The nine year history of the Peiler application in the patent office (5 App. Rec.) comprising 745 printed pages and various *ex parte* affidavits, to which copies of articles, etc. were attached, one of these being the Clarke article, had been offered by Hartford as an exhibit, and received by the district court. The patent office history was, of course, competent evidence, to show what had happened in the patent office, but equally of course, the *ex parte* state-

ments in it were not proof of anything except that they had been made.

The Hartford appeal brief called attention to the Clarke article, saying (R. 176):

> *"It broke the Owens Domination.** The article by William Clarke, former President of the Glass Workers Union (Rec. V. 592, *et seq.*) gives an admirable outline of the effect of the *Peiler plunger feeder* on the Owens machine business. His chart reproduced opposite this page (Rec. V, 602), showing the production curve of the two types of machine, speaks for itself."

This meant to Judges Buffington and Davis that a wholly disinterested, unbiased and qualified authority had prepared a chart which showed that the plunger feeder of the Peiler patent had created gob feeding. But this representation that it was the Peiler plunger feeder which was responsible for the gob feed production from 1917 through 1925 was contrary to the undisputed facts in the case. It was not until 1922 that Hartford first installed one of these feeders, according to its own testimony, and as found by the trial court, 39 F. 2d 117, and the application for the patent was not filed until November 1919. The plunger feeders, of the type used today, of Howard, Miller, Tucker & Reeves, the Owens Company, and others were in wide use years before the Hartford feeders (39 F. 2d 116, Peiler aff., 5 App. Rec. 278).

Hartford since about 1914 had been experimenting with a type of feeder known as the *paddle* type, some of which were used by glassware manufacturers. It was a type

*Emphasis in original.

of feeder entirely different from the *plunger* feeders of today, and long since obsolete. There was not any plunger in the *paddle* feeders, but instead

> "a paddle moving in the main body of glass in the furnace impelled a measured charge of glass over the lip of a dam from which it flowed into the mold. By this feeder it was possible to regulate the weight of the mold charge with reasonable accuracy, but shaping it or cutting in suspension was out of the question" (39 F. 2d 116).

This paddle and dam operation may be contrasted with the simple plunger feeder principle of allowing the glass to flow freely from the furnace and through a hole in the bottom of an adjunct to it, with a plunger reciprocating above the hole. The Peiler patent in suit shows such a plunger feeder, without any paddle, as did also the early Hazel patents of Brookfield 883,779, filed in 1903, and Bowman 1,166,576, filed in 1914, referred to in the district court's opinion, 39 F. 2d 114.

According to the chart of the Clarke article, these Hartford paddle feeders were either not "gob feeders" or did not produce any ware, because the chart, which shows production from 1905 to 1925, does not show any gob feed production prior to 1917. In 1918 Hartford put out a *paddle-needle* feeder, whose basic principle was the same as the *paddle* feeder, supplemented by a plunger, which Hartford called the needle. Finally, in 1922, several years after the plunger feeders of Howard, Miller, Tucker & Reeves and others had been in wide and successful use. Hartford abandoned its paddle feeders, imitated the others, and commenced to put out plunger feeders (39 F. 2d 116, et seq.).

It is plain that the Clarke article was false, in saying that the Peiler plunger feeder of the patent in suit was responsible for gob feed, as represented by Hartford to the patent office and to the court of appeals.

The reference in the Hartford brief on appeal to the Clarke article was answered in the Hazel brief, which, however, had to deal with the numerous issues presented by the voluminous record. The Hazel brief did not devote much time or space to the obviously incompetent article, but it did say, however, that "The chart is entirely misleading", that it proved nothing with respect to the Hartford plunger feeders, and that it was incompetent (R. 177, 178).

The decision of the circuit court of appeals was by a divided court. Judge Buffington wrote the opinion, relying upon the Clarke article, with Judge Davis concurring. Judge Woolley filed a dissenting opinion, in which he did not mention the Clarke article, saying, 59 F. 2d 413:

> "I do not find the bottle glass art so barren of invention as the court indicates in its opinion. Between the time of man-blowing methods and the patent in suit there were at least fifteen patents covering a glass bath in which a reciprocating plunger operated to accelerate and retard the flow of molten glass through an orifice and, in some cases, to form a gob suspending from the orifice, then to be cut off and transferred to a bottle mold. These elements constitute the main structure of the apparatus of the patent and embody its primary function. In adopting and combining them Peiler, so far, did nothing even remotely inventive. He simply took them and used them as he had found them."

But the Clarke article was to the contrary, and Judges Buffington and Davis were so biased by it that they paid no attention to the evidence in the case, or the findings of the trial judge. For the appellate court, Judge Buffington said, 59 F. 2d 401:

> "As we have indicated, the *labor organizations* were vitally interested in the supplanting of hand blowing by mechanical blowers, and we naturally look to the proceedings of their several organizations to find what machine blowers were of practical working capacity and ones which they regarded as supplanting lung blowing. We can therefore, and do, *rely on their opinion* in that regard, for successful machine blowers largely spelled ending of the supremacy of lung blowing. *In an article prepared by the president* of one of these unions, he said:"

This article was the Clarke article, prepared and written by Hatch, a Hartford patent attorney. Judge Buffington's opinion says (p. 403):

> "It is interesting to note that in that connection the trade, *these labor organizations of practical workmen*, recognized the fact that both the Owens and the Brooke devices were of the same character", etc.

The opinion refers to the plunger feeder at page 404, saying:

> "This new machine and its new and differentiating elements were tersely stated in such article as follows: *'Instead of employing a stream of glass which collected in the mold until the desired mold charge had accumulated, these new feeders cut off*

*a suspended chunk or gob of glass which was preformed during suspension to correspond, to some extent, at least, to the shape of the mold cavity in which it was to be received.'**

"We shall later see that in these few words this practical glass blower official summarized the novel characteristics of the machine which is the subject-matter of this suit. And be it observed, he notes the exact differences between Owens and this new machine."

It would have been surprising if the Hartford patent attorney, "this practical glass blower official", had not used the above patent jargon, which was the gist of the claim in the patent application which the article was written to obtain. The same language is again repeated by Judge Buffington at page 407, as

"by the union official just referred to in language we now repeat and whose keen accuracy will be better appreciated from what has been shown in the intervening part of this opinion."

Hartford attempts to justify this language by referring to the proceedings of the labor union (R. 207). But all that those proceedings contain is "the gob process of dropping glass into a mould" and "the Hartford-Fairmont flow", as appears from the parts referred to by Hartford. There is nothing about either pre-forming or cutting during suspension, which are the gist of the patent.

Judge Buffington said that Peiler had the idea of a plunger feeder as early as 1914, although the trial judge, who heard Peiler testify, pointed out that the evidence

*Emphasis in original.

showed that "between 1911 and 1918 he followed too many will-o'-the wisps to have been in the possession of the true light", 39 F. 2d 116, and that he was claiming invention for the use "of greater than simean intellect" (p. 118).

The prior art was disregarded (p. 412):

> "We are therefore warranted in refusing to strike down this patent on the strength of alleged anticipations which absolutely did not disclose Peiler's device or tell the art how to produce the product with which he has swelled to great output in a great industry. In point of fact, the independent operators who were threatened with annihilation by the Owens device, found nothing in this swarm of alleged patent anticipations to relieve them, and *the labor conventions asserted,* as they did, that none of these alleged prior devices had any effect. We may safely assume these futile devices did not enter into the situation then and should not now, because their worth and alleged pertinence is based on fiction without support of fact."

and (p. 413):

> "And where an art, eager for relief, found in these moribund patents nothing to meet that suggested solution, it is safer to rely evidentially on the then judgment, attitude, and conduct of the glass trade rather than on the *post litem* testimony of experts, the contentions of infringers, and the theoretical construction that often tempts courts to create out of lifeless patents an imaginary machine on paper which a working art could not do in steel".

There can be no doubt that the Clarke article poisoned Judge Buffington's mind, and made him incapable of rendering a fair decision on the evidence in the record, biasing him to reach the conclusion that Peiler was a pio-

neer inventor. The fact that there may have been competent evidence in support of the Hartford contentions does not diminish the right to a hearing by a tribunal not improperly biased, in this case by fraudulent and incompetent evidence. For example, in *Klein* v. *Darnell*, 5 Cir., 239 F. 844, where hearsay declarations in a letter were admitted in evidence in a jury trial, this was held reversible error, the court saying (p. 847):

> "As they related directly to the only fact that was submitted to the jury, viz., the alleged refusal of McQueen to act as trustee, we cannot say that they did not influence the jury to find the fact of refusal, when upon the uncorroborated evidence of the mortgagee, Hazard, they might have been unwilling to do so."

In the present case, there is no doubt that the incompetent Clarke article did bias the court, as appears from its opinion.

The dissenting opinion of Judge Biggs below was right in finding that the Clarke article biased the court in favor of Hartford, and that, there not having been a fair hearing on the merits, petitioners, and the court itself, were entitled to have it.

POINT III

The court below erred in holding that there was lack of diligence.

The majority of the court below thought that the Hazel and Shawkee petitioners were lacking in diligence in presenting to the court evidence of the fraud upon it, Judge

Biggs concluding otherwise. As will be pointed out later, even if there had been lack of diligence, the court should still have corrected its fraudulently obtained judgments, because of the public interest. And there was no lack of diligence.

The facts concerning diligence are not in dispute.

During the trial in 1929 of the *Hazel* case in the district court, the Hazel counsel were told by one William R. Wood, a Cincinnati lawyer, that Clarke in 1926 had said to him that he, Clarke, "did not write that article. It was prepared and written by a Mr. Hatch, an attorney for the Hartford-Empire Company, and he induced me to sign it which I did", and also that during a 1929 trial in Cincinnati Hatch had admitted to him the foregoing (R. 28). Wood's son, Edmund P. Wood, also a Cincinnati lawyer, also told the Hazel counsel that Hatch had said to him "that he was the real author of this article and the incident has always been the source of a certain amount of joking between us about his ability as an author, and his double life as a prominent labor union official" (R. 30). The Woods for many years represented defendants fighting against the Hartford patents, and in 1932 were counsel for the Nivison Company in the sixth circuit case of *Hartford* v. *Nivison* (R. 26).

During the trial of the *Hazel* case, as aforesaid, Hartford did not attempt to rely upon the Clarke article, which was not mentioned by anyone.

After receiving the May 5, 1932 opinion, the Hazel people endeavored to ascertain the facts concerning the Clarke article, and the Woods put in affidavit form what they said they remembered Clarke had said in 1926, and Hatch two and three years later. But these were only

memories, unsupported by any documentary evidence, and also were by lawyers representing interests adverse to Hartford and the Peiler patents.

A firm of investigators was employed by Hazel, and McCarthy of that firm on May 11th saw Maloney, the labor union official who had refused in 1926 to sign the article which Hatch submitted to him, but got nothing useful, as Maloney was still unwilling to take sides in the patent litigation (R. 17). McCarthy then went to Clarke, whom he saw on May 13th in Toledo, and asked him concerning the article. Clarke said that

> "if he was called into court he would be able to prove that he wrote the article and sent it to the 'National Glass Budget' for publication" (R. 20).

Clarke was then told of the statement of Wood that Clarke had told him that Hatch had written the article, to which Clarke replied

> *"that he did not recall having made any such statement to Mr. Wood*, but that he told Wood, as he had told me, the Hartford-Empire Company *may* have furnished him with certain material and information on which the article was based" (R. 22).

However, Clarke said that he had some old records (this was in 1932) of this 1926 matter, which he would look up, and "if you are around this way some time next week, I will have them for you and we will go over them together" (R. 21).

On May 24th, McCarthy again saw Clarke and found that "Clarke's attitude was somewhat changed", Clarke being much stronger in his position that "Wood was mistaken" (R. 23). Clarke declared that "I worked on that

article for seven weeks before I signed it in Philadelphia" (R. 24), "I wrote that article in the interest of the general public, and I'll stick to that" and "I wrote it as an individual" (R. 25). He also refused to show his records unless compelled by subpoena.

The new evidence produced in 1941 by the government during the trial of the antitrust suit in Toledo showed that on May 16, 1932, after the first visit of McCarthy to Clarke, the latter telephoned to Naylor of the Owens Company, who then telephoned Smith of the Hartford Company (R. 43), and on the same day Naylor wrote Hatch of Hartford suggesting he call Clarke, because "For some reason or other, Clarke has had a change of heart about the whole situation, and I believe it would be well to follow the matter closely to determine just what the difficulty seems to be" (R. 43).

As we shall see, Hatch did "follow the matter closely", did find out what was "the difficulty", and did prevent "a change of heart".

On May 23rd, Hatch went to Toledo, saw Clarke and had dinner with him, and also saw him the next day (R. 34), which was the same day that McCarthy saw Clarke and observed his changed attitude. There is no evidence as to what Hatch said to Clarke on those two days, but Hatch admitted in the antitrust trial that on July 22nd (which was immediately after the Hazel Company had signed its Hartford license, and when it was too late for Hazel to apply for a rehearing), that he gave Clarke $500 *in cash* (Hatch, R. 38). Hatch said that the reason for this was because Clarke "felt Hartford was under obligation because of the work he did on the Clarke article, and because he was bothered by investigators", Hatch also saying

that "My personal feeling was that there was a *certain moral obligation* on the part of Hartford" to pay Clarke (R. 37). Clarke wanted $10,000 and got $500 from Hatch on July 23rd, and $7,500 more, again in cash, on August 11, 1932 (Hatch, R. 39).

Under these circumstances, the Hazel investigation of what Clarke had to do with the article came to nothing, except to show that Clarke was insisting that he, not Hatch, wrote the article, which was contrary to the memories of the Woods. The majority opinion suggests that Hazel might have asked Hatch, the Hartford employee, about this matter (R. 220), but as Judge Biggs said (R. 238):

> "This is a suggestion scarcely justified by the record for Hartford-Empire or Hatch paid Clarke $8,000 within a short time after McCarthy's final interview with him. It was not necessary for Hazel Atlas to have taken such a vain step in order now to be able to prove its diligence."

The weakness of Hazel's information concerning the Clarke article is evidenced by the unsuccessful presentations of this information to the court below in the *Shawkee* case in 1933, and another suit on the same patent by Hartford in Florida in 1934 against Florida Glass Manufacturing Company (R. 55), in which McCarthy made an affidavit for the defendant there regarding his investigations in behalf of Hazel of the Clarke article (R. 190). In the *Florida* case, the court granted Hartford's motion for preliminary injunction.

All that Hazel in 1932 could have done with respect to the Clarke article after its investigation, thwarted by Hartford, would have been to apply for rehearing on the ground that the article was incompetent, which point had

already been presented to the court in the briefs, and on the ground that Hartford was the author of the article, as to which there were contradictory versions, by the hearsay information obtained from the Woods and Clarke. These things were later presented to the same court by Shawkee, and also to this Court, but the Shawkee petitions containing these grounds were dismissed. Similar attacks on the Clarke article were also disregarded in the *Florida* case. There can be no doubt that Judges Buffington and Davis in the *Hazel* case had been convinced by the Clarke article that Peiler was a pioneer inventor, and that this conclusion would not be changed, merely because of hearsay attacks upon the competency or accuracy of one of the things which had persuaded them.

The newly discovered evidence goes far beyond the contradictory hearsay information available to Hazel, Shawkee or Florida, prior to the taking of the testimony in the antitrust suit and production of the documents here relied upon. Not only does it dispose of the hearsay difficulty and make clear why Hazel's investigator was able to get so little cooperation from Clarke in 1932, but it shows affirmatively by contemporaneous documentary evidence what was Hartford's object in skillfully compiling this article, publishing it in Clarke's name, and concealing Hartford's connection with it. The new evidence leaves no doubt that the article was so compiled and published for the purpose of creating the very kind of false impression to influence favorable consideration of Peiler's claims that it eventually exerted on the majority of the court below. In short, the new documentary evidence shows that Hartford, by its actions in connection with this article, deliberately set a trap calculated to produce the

fraudulent effect upon judicial consideration of Peiler's claims, which it, in fact, produced in this case. No such evidence was available in 1932 to Hazel or Shawkee, or until it was produced in the antitrust suit in 1941.

There is no question as to the Hazel or Shawkee companies promptly moving, after the Government produced the evidence, to present it to the court below.

The court below erred in concluding that there was lack of diligence.

POINT IV

The court below should have set aside its judgment although the term in which it was entered had expired.

There was fraud practiced on the circuit court of appeals, which influenced its decision that the Hartford patentee was a pioneer inventor and that the patent was of major importance, as has been shown. The majority of the court below thought it was impotent to remedy the wrong which had been done, not only to the defendants, but to strangers interested in the Hartford patents. Judge Biggs disagreed, and he was right, pointing out that the court had

> "a duty to protect the public from an unwarranted monopoly imposed by a patent. Quite aside from this, however, we have the duty to preserve the integrity of our appellate jurisdiction against fraud. As I see the facts, action upon that duty is clearly imposed upon us by the petitions at bar" (R. 241; 137 F. 2d 777.).

With respect to the "duty to protect the public", the majority of the court failed to appreciate the value to the

Hartford patent position of the opinion by Judge Buffington that Peiler was a pioneer inventor, that the Hartford Company was responsible for gob feeders, and that "Peiler made a notable contribution to the art", 59 F. 2d 413. On the basis of that opinion Hartford obtained and now has patents which do not expire before 1954. These were ordered issued by the court of appeals of the District of Columbia, because of Judge Buffington's opinion and also the Clarke article, both of which are quoted in the opinion of that court, *Hartford* v. *Coe*, 87 F. 2d 741, 743.

It would seem so clear as not to require argument that the court below had both the duty and the power to protect its appellate jurisdiction from fraud practiced on it. Court proceedings are not merely private controversies—the public is always interested in the proper administration of justice. As this Court said in *N. Y. Central RR Co.* v. *Johnson*, 279 U. S. 310, 318:

> "But a trial in court is never, as respondents in their brief argue this one was 'purely a private controversy . . . of no importance to the public'. The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court on its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice."

Turning now to the precedents, there is, of course, no question of the right to set aside a judgment obtained by fraud, if the proceeding be commenced before the term when the judgment was made has expired. But when the

term has expired,* some authorities hold that only *extrinsic* fraud will authorize such action, and that *intrinsic* fraud will not.

The pertinent decisions of this Court are *U. S.* v. *Throckmorton,* 98 U. S. 61 and *Marshall* v. *Holmes,* 141 U. S. 589.

In the *Throckmorton* case, the alleged fraud related to a deed for land, which was the subject of the original suit, and which was validated, after a thorough trial in that suit. The alleged fraud was that the maker of the deed had fraudulently antedated it and that false affidavits were filed. The bill to set aside the judgment was filed by the United States twenty years after the decision, against purchasers from the person successful in the suit, and the principal witnesses had died. The court below sustained a demurrer to the bill.

This Court affirmed, saying that the fraud was "intrinsic", that there was an "absence of any declaration of the means by which the fraud has been discovered or can be now established", and that the Attorney General did not bring or authorize the suit (p. 70). It was "For these reasons" that the decree below was affirmed (p. 71).

With respect to fraud, this Court said "There is no question of the general doctrine that fraud vitiates the most

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*The term of court rule seems to have originated in *Bronson* v. *Schulten,* 104 U. S. 410, the cases cited therein (p. 415) being doubtful authority for the conclusions expressed. Today, in district courts, "The new Rules of Civil Procedure have rendered anachronistic the technical niceties pertaining to terms of court as to both law and equity", *Sprague* v. *Ticonic Bank,* 307 U. S. 161, 169. In criminal cases also, to which those Rules are inapplicable, these "niceties" are doubtful, *U. S.* v. *Bruce,* 52 F. Supp. 150 (D. C. Ky.), discussing *U. S.* v. *Mayer,* 235 U. S. 55, in the light of *Holiday* v. *Johnston,* 313 U. S. 342.

solemn contracts, documents, and even judgments" (p. 64), and that such a bill will lie

> "in cases where by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practised on him by his opponent, etc., relief has been granted" (pp. 65, 66).

The ground for this was

> "that, by some fraud practised directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all his case to the court.
>
> "On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed" (p. 66).

The fraud "practised directly upon the party" has come to be called "extrinsic" fraud, and the second kind of fraud "intrinsic". The validity of such a distinction has been frequently questioned.*

In the *Marshall* case, this Court disregarded the "intrinsic" and "extrinsic" distinction, and sustained a bill to set aside a judgment obtained by "false testimony and forged documents" (141 U. S. 590, 592), after the term

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*22 Harv. L. Rev. 600, 601; 12 Cornell L. Quart., April 1927, p. 385; 23 Calif. L. Rev., Nov. 1934, p. 79; *Grazer* v. *Faurot*, 7 Cir., 76 F. 257; *Publicker* v. *Shallcross*, 3 Cir., 106 F. 2d 949, 951; *Brady* v. *Beams*, 10 Cir., 132 F. 2d 985, 986

had expired (p. 601). It has been said that the *Marshall* and *Throckmorton* cases "seem to constitute an irreconcilable conflict in the Supreme Court" (Harv. Law Rev. article and *Publicker* opinion, footnote, *supra,* p. 30).

However, even if only "extrinsic fraud" will support a bill filed after the term, there was such fraud here, because Hazel was prevented "from exhibiting fully" (*Throckmorton* opinion, *supra*) its case. The fraudulent Clarke article was not considered in the judgment of the district court, and was never offered in evidence. It was in the record only as a very small part of the voluminous patent office history of the Peiler patent, which was offered in evidence in the usual way by Hartford, to show what happened in the patent office. Hartford did not offer the article itself nor make any mention of it in the the trial court. There was nothing for Hazel to meet at the trial. But the presence of the article in the patent office history enabled Hartford to make an improper and incompetent, and, as it turned out, viciously successful use of the article in the court of appeals, where it was effective to bias the majority of that court. After the apparently innocent and disinterested article had been read by Judges Buffington and Davis, whose minds it poisoned, it is not surprising that they ignored the technical although sound argument by Hazel that it was incompetent and contrary to evidence in the record which was competent.

In addition, Hazel was prevented, after Judge Buffington's opinion appeared on May 5th, from obtaining proof that Hatch of the Hartford Company, and not Clarke, had written the Clarke article, by Hartford getting first to Clarke (*supra,* p. 22 *et seq.*)

For another reason, the court below should have set aside its decision, namely, because it was the result of fraud practiced on the court itself. That has long been the rule in the English courts, *Richmond* v. *Tayleur*, 1 P. Wms. 734; 737; *Brooke* v. *Lord Mostyn*, 33 Beav. 457, 2 D. & J. 373, and *The Alfred Nobel*, etc., Prize Court, 87 L. J. P. 183; 119 L. T. 320; 14 Asp. N. L. C. 366. In this last case, an application was made to set aside an order entered three years before, because of fraud on the court. The application was granted, the court saying:

> "There was clearly a *suppressio veri*, and there was more than a *suggestio falsi*—there was an *expressio falsi*."
>
> "Every court has an inherent right to set aside an order which it has made, and which is procured by fraud, and that applies to the Prize Court certainly as strongly as to any other court."

The decisions by the second circuit court of appeals in *Art Metal Works* v. *Abraham & Straus*, 107 F. 2d 940 and 944, certiorari denied, 308 U. S. 621, petition for rehearing denied, 309 U. S. 696, are squarely in point. In those cases, the decisions attacked were entered in 1934, in patent suits, and in 1939, long after the terms had expired, petitions to set aside were filed and granted. The petitions were based upon newly discovered evidence of fraud, practiced on the court, which biased it against the defendant.

The particular way the court was there biased, so that a fair hearing on the evidence was not had, was by paying money to one of the judges. In the present case, the biasing was by a fraudulent article, fraudulently used on the court. The principle is the same,—in both cases judicial minds were poisoned to prevent a fair hearing.

In the court below, Hartford endeavored to distinguish the *Art Metal* cases, saying that the judgments there were void, not merely voidable, inasmuch as one of the judges was pecuniarily interested in the case. But that was not the basis of the decisions, nor could it have been so accurately. A judgment in a federal court by a pecuniarily interested judge is not void, but only voidable. This Court said in *Tumey* v. *Ohio*, 273 U. S. 510, 524, "it is very clear that the slightest pecuniary interest of any officer, judicial or quasi-judicial in the resolving of the subject matter which he was to decide, rendered the decision voidable", citing English authorities. That such a decision is only voidable, and not void, was held in *Utz* v. *Regulator Co.*, 8 Cir. 213 F. 315; *Owens* v. *Dancy*, 10 Cir., 36 F. 2d 882; *In re Fox West Coast Theatres*, 25 F. Supp. 250, 257 (D..C. Calif.), aff'd. 88 F. 2d 212; *Crites* v. *Radtke*, 29 F. Supp. 970 (D. C. N. Y.).

The majority opinion suggests that Hazel and Shawkee could file original bills in the district court, to impeach the decrees which that court entered under mandate from the circuit court of appeals, because of fraud upon this last named court. But the court of appeals was the proper tribunal to decide whether it had been wrongfully biased, and what should be done about it—not the district court, as Judge Biggs points out, saying rightly that the

> "fraud can be relieved of only by the exercise of our appellate jurisdiction precisely as the fraud worked upon the Circuit Court of Appeals for the Second Circuit could be cured only by that tribunal. If we do not exercise our jurisdiction the petitioners will be without relief from the fraud practiced on this court" (R. 231).

Plainly, the procedure in the present case was righ in applying to the appellate tribunal which had been im properly biased to prevent a fair hearing on the merits.

CONCLUSION

The circuit court of appeals for the third circuit wa wrong in deciding that it should not set aside its forme decisions sustaining the Hartford patent, and rehear th cases on the competent evidence before it. The Hazel an Shawkee defendants in the cases, as well as the publi have a right to fair hearings on whether Peiler was a re inventor and the Hartford Company contributed anythin substantial to the glassware industry, without influence o bias from the Clarke article.

The decision below should be reversed, and the cou below should be directed to vacate the prior proceedin based on its opinion of May 5, 1932,

> "and restore this cause to the docket of this Cou for reargument upon the original briefs filed here or upon such supplemental briefs as the parties ma wish to file, and fix the time for the filing of suc briefs and reargument" (amended petit., R. 173

Respectfully submitted,

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December, 1943.